himself, he must remove it. A loose use of the word presumption occurs in respect to what is called a suspicious alteration. So long as the parties were incompetent to testify, the only evidence usually available was intrinsic to the instrument. If the proponent had the burden of proof, it is clear that if on inspection the alteration was in his handwriting, and was favorable to him, or if an erasure was of a clause in the interest of the maker, he has not produced sufficient evidence to justify a jury in finding that the preponderance of probability was that the alteration was prior to execution. So far as it goes, the probative force of the data known to the jury is to the contrary. If then the proponent has no other evidence to produce, he has failed to validate the altered instrument. It seems quite clear that the fact of an erasure, an interlineation, a change, a correction, the filling in of a blank, or the fact that the sentence written is longer than the space allotted to it, and therefore is written on a slant or extends into the margin, is not so probative of an alteration, either before or after execution, as to serve as the basis of a presumption of the sort which operates to relieve a party from showing the existence of what is normally implied from the data known to the court and jury. The probative value of the erasure, etc., depends on the circumstances; and with the growing prevalence of prepared and written forms to fit the average case, which require a certain amount of erasure and interpolation to suit the occasion, the hurry and rush of modern business, which precludes the re-writing of documents containing errors, the notorious inaccuracy in both mechanical and human typewriters who have now taken the place of the long ago extinct race of careful draughtsmen, the mere presence of a change in the written matter of an instrument may as well be the correction of a mistake as a subsequent change. Neither the holder nor the maker, in general, has any greater power than the other to prove an alteration. And even though both parties could testify, yet the nature of the alteration was often the only means of proof; and therefore, though there might have been ground for creating a presumption based on the general difficulty of proving a legally important and constantly recurring fact, yet such difficulty of proof is not sufficient. The data must be such that the fact assumed is one which is the normal inference therefrom. Here the data is of an infinite variety, both in itself and in its probative value in connection with such intrinsic facts as are usually provable; and there is no experience to show that it is so usual for a particular change to be made before or after execution, that the contrary is abnormal.

J. H. C.

CANCELLATION OF DEEDS EXECUTED UNDER INFLUENCE OF THREATS OF CRIMINAL PROSECUTION.—The term duress combines the idea of involuntary action with that of unfair advantage taken

by the oppressor; and in this latter respect it bears close analogy to fraud. Originally only such force would be considered duress as would be sufficient to overcome the will of a courageous man;[1] later the test of a person of ordinary firmness was applied;[2] but now the age, sex, state of health, and mental characteristics of the oppressed person are considered.[3] There must be an unlawful force,[4] and it must be applied by the person taking advantage thereof;[5] or if not applied by him, it must be with his knowledge or for his benefit.[6] It is held that one profiting by duress applied on his behalf adopts the means in adopting the end.[7]

Threats, in order to be considered as constituting duress, must be threats of some unlawful act toward a person or his near relative. The courts have always taken the humane attitude that one is affected by a threat directed against a member of one's immediate family, in the same manner as if it were directed against one's self. Formerly duress could only be found in four classes of threats: (1) "For Fear of Loss of Life; (2) Of Loss of Member; (3) Of Mayhem; (4) Of Imprisonment."[8] There are cases which adopt the rule that threats of criminal prosecution would or would not be duress depending upon whether the prosecution were illegal or not,[9] thus allowing the sufficiency of the fear of prosecution, but not considering it an unlawful force when there is a just cause for prosecuting. But the best and almost universal rule now is that fear of prosecution is duress in cases in which an innocent person is moved to pay money, execute a deed, or give security under threats of prosecuting a close relative, such as a son,[10] a husband,[11] a brother,[12] a nephew,[13] or a son-in-law,[14] although the relative be justly amenable to the prosecution.

This change in the doctrine concerning threats of prosecution is explained by our higher conception of the right to institute criminal proceedings. In the early English law it was a personal right of revenge and satisfaction, and, in many cases, the only method of obtaining restitution. But now the prosecution is to avenge the Commonwealth and to prevent a recurrence of the offense; and to employ it for personal ends is an unlawful abuse of process.

[1] Galusha v. Sherman, 105 Wisc. 263, 81 N. W. 495 (1900) gives account of the historical development.
[2] U. S. Banking Co. v. Veale, 84 Kan. 385, 114 Pac. 229 (1911).
[3] Cribbs v. Sowle, 87 Mich. 340, 49 N. W. 587 (1891).
[4] Stouffer v. Latshaw, 2 Watts 165 (Pa. 1834).
[5] Girty v. Standard Oil Co., 1 App. Div. N. Y. 224 (1896).
[6] Frederick v. Copeland, 18 Md. 306 (1892); Hughie v. Hammett, 105 Ga. 369, 31 S. E. 109 (1898).
[7] Merchant v. Cook, 21 D. C. 145 (1892).
[8] Bacon's Abridgement, Vol. 2, p. 156, referring to Coke, 2 Inst. 482.
[9] Gregor v. Hyde, 62 Fed. 107 (1894).
[10] Ball v. Ward, 76 N. J. Eq. 8, 74 Atl. 158 (1909).
[11] Rostad v. Thorsen, 83 Ore. 489, 163 Pac. 423 (1917).
[12] Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946 (1891).
[13] Sharon v. Geiger, 46 Conn. 189 (1878).
[14] Fountain v. Bigham, 235 Pa. 35, 84 Atl. 131 (1912).

However, this extension of the doctrine of duress by threats has an important limitation. The law will permit one who has suffered by a wrongful act, which has a criminal and civil aspect, to recover a civil satisfaction from the guilty person himself; and the latter cannot have a just restitution set aside because it was made under the influence of threats of the legal process to which he is amenable.[15] It may be said that it is not an abuse of process to institute criminal prosecution for the purpose of obtaining just restitution, or perhaps better, that it is the policy of the law to restrict the doctrine of threats of prosecution to innocent persons on whom no civil liability rests. On this reasoning, an innocent person who is accused in good faith of a crime such as embezzlement, should be allowed to recover a supposed restitution made under threats of prosecution.[16] But where the person is guilty, there must be at least a warrant of arrest, and, according to some cases, abuse of imprisonment in order to constitute duress.[17] Mere threats of prosecution against the guilty person constitute duress in cases in which the crime is purely of a public nature without any attendant civil liability, or the debt for which restitution is made does not arise from the offense for which prosecution is threatened.[18]

In the recent case of *Savannah Bank v. All*,[19] A executed a deed to her son B, in order to enable him to execute a mortgage to the bank to cover an indebtedness of her other son C, incurred by obtaining money under false pretenses. A remained in possession of the property; and after the mortgage was foreclosed, and the property was bought by the bank, and the statutory period during which the son could have been prosecuted had run, she petitioned to have the deed and mortgage cancelled. A's motive in executing the deed was to protect her son from prosecution; and this was known to the bank, although the bank's agent at the transaction expressly disclaimed any concern with the criminal side of the matter.

The District Court[20] found no evidence of duress; but, because the deed was given to stifle a criminal prosecution, and possession had been retained by A, it decreed cancellation on the ground that it was an illegal contract.

The Circuit Court reversed the decision because the consideration was simply to settle the civil liability; the motive of the mother to prevent prosecution did not make the transaction

[15] Compton v. Bunker Hill Bank, 96 Ill. 301 (1880); Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718 (1891).

[16] See Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010 (1891) and Kronmeyer v. Buck, 258 Ill. 586, 101 N. E. 935 (1913).

[17] Shaw v. Spooner, 9 N. H. 197 (1838); Holbrook v. Cooper, 44 Mich. 373 (1880).

[18] Thompson v. Niggley, 53 Kan. 664, 35 Pac. 290 (1894); Woodall v. Peden, 274 Ill. 301 (1915).

[19] 260 Fed. 370 (1919).

[20] 250 Fed. 120 (1918).

illegal; and even if the transaction had been illegal, because compounding a felony, the parties were in *pari delicto* and the contract was executed, and therefore equity could not interfere. The court then reasons that a suit for cancellation of a deed executed under duress is one for relief on the ground of fraud, which is barred by the code in six years from the discovery of the fraud; and in this case the discovery of the fraud was at the time of executing the deed since all the facts were known then; and, as more than six years had elapsed since that time, the action was barred. Finally, the mother was guilty of laches in waiting until the mortgage was foreclosed.

In finding no duress it is questionable whether the courts are not adhering to the language used rather than the idea conveyed.[21] In the leading English case of *Williams v. Bayley*[22] a sensible view was taken. A son had obtained credit from a bank on forged notes. The father agreed to secure the bank against loss. There was no promise not to prosecute nor any direct threat of prosecution, although mention was made of the gravity of the offense. The Court granted a decree declaring the agreement invalid and ordering it cancelled, as the father was swayed by the fear of his son being prosecuted, and the object of the agreement was to stifle a criminal prosecution.

In its reasoning that, even had there been a promise not to prosecute, relief could not be given, because the parties would be in *pari delicto*, the court in the principal case draws a distinction between a promise not to prosecute and a threat to prosecute, which seems to be verbal rather than logical. It seems that each should carry the same mental stimulus of hope and fear moving the mother to act in order to save her son from prosecution.

As a matter of code interpretation, it is not clear that the period of limitations applying to fraud should apply in this case from the time of signing the deed. If the facts were known at that time, there was no fraud, and in attempting to make the analogy between duress and fraud an identity, the court shows their difference.

The last reason given by the Court against cancelling the deed, is laches. Had there been such duress at first as to justify cancelling the deed, it would not seem equitable to find the mother guilty of laches in not having it cancelled during the continuation of the original condition. If the fear of prosecution had been

[21] In Foley v. Green, 14 R. I. 618, 1 Eastern 40 (1885) the facts were similar to those of the principal case and the note and mortgage were annulled. "It is true there was no direct threat by Hanley, but there was a pressure exerted which had the effect and was doubtless intended to have the effect of a threat." In Jones v. Merionethshire Building Society, 65 L. T. R., N. S. 685 (1891) the Court of Appeal found an implied promise not to prosecute but did not find an implied threat. See also Ellyson v. Schooler, 149 Iowa 332, 128 N. W. 551 (1910). Here an implied promise was found to make the notes invalid. The question of duress was not discussed, as it was not necessary in the determination of the case.

[22] L. R. 1 Eng. & Irish Appeals 200 (1866).

sufficient to deprive her of her free will in executing the deed, it might also be sufficient to prevent her attempting to cancel it so long as her son's debt to the bank was unsatisfied and he remained liable to criminal prosecution.[23] Furthermore, the position of the lower court seems reasonable, that the failure of the mother to intervene in the foreclosure proceedings would not operate as a bar, since the proceedings were against the son and the mother had not been made a party defendant.

J. B. G., 2nd.

CONTRACTS ILLEGAL BY STATUTE.—The question whether a transaction comes within the prohibition of a statute would appear, at first thought, to be purely one of construction. The inquiry that naturally suggests itself in every case in which the legality of a contract, involving some act or transaction within the purview of a prohibitory or penal statute, is in question, is: Does the Act forbid the contract? It is obvious that the solution of the problem represented by the question may involve two distinct lines of inquiry. The purpose of one is to determine the legislative intent, in respect of the effect of the statute on contracts founded upon or growing out of a violation of the act. On the other hand, in those cases where the contract is not directly founded upon a violation or evasion of the statute, either in its consideration or immediate purpose, and involves only indirectly a breach of the law, a second inquiry may be necessary to determine whether it may not, in spite of the remoteness of the connection, be affected by the illegality.[1]

The various rules adopted by the courts, purporting to be rules of construction, have tended to become crystallized to such an extent that they serve in many instances to control, rather than interpret, the legislative intent. It is a rule universallv accepted that, if a statute renders a contract illegal, such a contract, if made, is wholly void and cannot be enforced; but there is considerable difference of method in determining what contracts are made unlawful by legislative enactment. A majority of the courts have adhered to the rule that each statute must be construed with reference to its language, subject matter, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished by its enactment.[2] The object of the construction in such cases is to determine the intention of the legislature as to the legality of the contract itself, considered as a subject matter of legislative intent, distinct and apart from the transaction which forms the consideration of the contract and which is the immediate

[23] Allen v. Leflore County, 78 Miss. 671, 29 So. 161 (1900); Wilson v. Calhoun, 170 Iowa 111, 151 N. W. 1087 (1915).

[1] See Toler v. Armstrong, 4 Wash. C. C. Rep. 297 (1822).

[2] Bowditch v. Ins. Co.— 141 Mass. 292, 4 N. E. 798 (1886); Pangborne v. Westlake, 36 Iowa 546 (1873).